IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

VALERIE R. BAKER, Plaintiff, vs. COMMISSIONER OF SOCIAL SECURITY, Defendant.	Civil No. 08-980-AA OPINION AND ORDER

H. Peter Evans
David B. Lowry
9900 SW Greenburg Road
Columbia Business Center, Suite 235
Portland, Oregon 97223-5502
Attorneys for plaintiff

Karin J. Immergut
United States Attorney
District of Oregon
Adrian L. Brown
Assistant United States Attorney
1000 S.W. Third Avenue, Suite 600
Portland, Oregon 97204-2902

Thomas M. Elsberry
Special Assistant United States Attorney
701 Fifth Avenue, Suite 2900 M/S 901
Seattle, Washington 98104-7074
Attorneys for defendant

AIKEN, Judge:

Plaintiff Valerie Baker brings this action pursuant to the Social Security Act, 42 U.S.C. §§ 405(g) and 1383(c)(3), to obtain judicial review of a portion of the Commissioner's decision. The Commissioner denied plaintiff's applications for Disability Insurance Benefits (DIB) under Title II of the Social Security Act, and for Supplemental Security Income (SSI) disability benefits, prior to her fiftieth birthday In October 2005. Because the ALJ failed to give sufficient reasons for rejecting competent lay witness testimony favorable to plaintiff, the ALJ's decision is reversed and remanded for further proceedings.

PROCEDURAL BACKGROUND

Plaintiff protectively filed her application for DIB and SSI benefits on October 16, 2001. Tr. 111-13. On April 22, 2002, after her application was denied initially and upon reconsideration, plaintiff requested a hearing. Tr. 40. The Administrative Law Judge (ALJ) held the hearing on November 4, 2002. Tr. 909-61. At the end of the hearing, the ALJ ordered a psychological evaluation. Tr. 954. Once this evaluation was completed, the hearing was reconvened on April 23, 2003. Tr. 962-81. On September 10, 2003, the ALJ issued a decision finding plaintiff not disabled. Tr. 474-86. Plaintiff timely appealed, and on December 6, 2005, the Appeals Council reversed the ALJ's decision and remanded the case for further administrative proceedings. Tr. 501-04. The Council directed the ALJ to (1) further develop the administrative record by obtaining additional evidence from treating physicians; (2)

consider all treating source opinions and explain the weight given to each opinion; and, if necessary, (3) obtain additional orthopedic or neurological examinations, expert medical testimony, and/or vocational expert testimony. Id.

The ALJ conducted a remand hearing on October 16, 2006, and on December 1, 2006, issued a partially favorable decision finding plaintiff disabled as of her 50th birthday on October 7, 2005, but not disabled prior to that date. Tr. 17-28, 982-1006. On June 23, 2008, the Appeals Council denied plaintiff's request for review, tr. 8-10, making the ALJ's decision the final agency decision. See 20 C.F.R. §§ 404.981, 416.1481.

STATEMENT OF THE FACTS

Plaintiff was 44 years old on the alleged onset date of disability, and was 50 years old as of the hearing date. Tr. 27. Plaintiff graduated from high school and attended two years of college, but did not earn a degree. Tr. 131. She has worked as a certified nursing assistant, autowrapper/rewinder, and equipment calibrator. Tr. 126, 145-48, 994. She alleges disability beginning May 28, 2000, due to pain, fatigue, and memory and concentration issues attributable to undifferentiated somataform disorder, major depressive disorder, degenerative disc disease of the cervical spine, and histrionic personality disorder. Tr. 125, 480; Pl.'s Br. 2, 12-13. She also alleges impairments associated with a thyroid goiter, headaches, fatigue, facial and extremity swelling, and hip pain. Pl.'s Br. 8.

At the November 4, 2002 hearing, plaintiff's son, Brandon, testified that plaintiff appears to be in pain about

60 percent of the time. Tr. 956-57. Cooking meals, helping him with homework, or doing a chore are all tiring for plaintiff, and she has to rest for 10 to 15 minutes for every 15 to 20 minutes of work. Tr. 957. Brandon estimated plaintiff completes tasks at about 40% the rate of a normal person. Tr. 958. He also testified that plaintiff cries "about the whole day" "close to every day." Id. Brandon was not interviewed when the hearing was reconvened in 2003 or on remand in 2006. The ALJ's decision on remand does not mention Brandon, but adopts the reasoning of the 2003 decision, which does reference his testimony. Tr. 26, 481.

A vocational expert (VE) also testified at the 2003 hearing. In response to the ALJ's hypothetical question, the VE opined that there were sedentary and light exertion jobs available in the local economy which plaintiff could perform. Tr. 999, 1002. When asked if missing two or more days of work per month would change her answer, the VE responded that missing two days of work per month would preclude plaintiff's successful employment. Tr. 1004.

STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229

(1938)). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusion." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

The initial burden of proof rests upon the claimant to establish disability. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months. . . ." 42 U.S.C. § 423(d)(1)(A).

The Secretary has established a five-step sequential process for determining whether a person is disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520, 416.920. First the Secretary determines whether a claimant is engaged in "substantial gainful activity." If so, the claimant is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§ 404.1520(b), 416.920(b).

In step two the Secretary determines whether the claimant has a "medically severe impairment or combination of impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R. §§ 404.1520(c), 416.920(c). If not, the claimant is not disabled.

In step three the Secretary determines whether the impairment meets or equals "one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity." Id.; see 20 C.F.R. §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively

presumed disabled; if not, the Secretary proceeds to step four. Yuckert, 482 U.S. at 141.

In step four the Secretary determines whether the claimant can still perform "past relevant work." 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant can work, she is not disabled. If she cannot perform past relevant work, the burden shifts to the Secretary. In step five, the Secretary must establish that the claimant can perform other work. Yuckert, 482 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e)-(g), 416.920(e)-(g). If the Secretary meets this burden and proves that the claimant is able to perform other work which exists in the national economy, she is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

DISCUSSION

I. The ALJ's Findings

At step one, the ALJ determined that plaintiff had not engaged in substantial gainful activity since the alleged onset of her disability. Tr. 24, Finding 2. At step two, the ALJ found plaintiff had the following severe impairments: undifferentiated somatoform disorder, major depressive disorder, and cervical degenerative disc disease. Tr. 24, Finding 3. At step three, the ALJ found that plaintiff did not have an impairment or combination of impairments that meet or medically equal one of the listed impairments in the regulations. Tr. 25, Finding 4. These findings are not in dispute.

At step four, the ALJ found that plaintiff's limitations left her with the residual functional capacity (RFC) "to

perform a wide range of sedentary exertion and a limited range of light exertion work." Tr. 26, Finding 5. In the September 2003 decision, the ALJ found plaintiff retained the ability to lift 20 pounds occasionally and 10 pounds frequently and to stand, walk, or sit 6 hours out of an 8-hour day. Tr. 483. He also found that plaintiff would be limited to "simple, routine, repetitive work with little public contact." Id. In the December 2006 decision, the ALJ amended these findings by determining that plaintiff was unable to lift 10 pounds frequently. Tr. 26. In addition, the ALJ found that plaintiff should avoid concentrated exposure to extreme temperatures, wetness, or humidity, and that plaintiff's social judgment and other cognitive functioning limitations "restricted her to unskilled work." Id. The ALJ based these conclusions on his finding that plaintiff and her son were "not entirely credible," and by crediting the medical opinions of plaintiff's examining physician, Dr. Kielich, and of two psychologists, Dr. Starbird and Dr. Wilcox. Tr. 26, 481. This finding is in dispute.

At step five, the ALJ found plaintiff was unable to perform any past relevant work. Tr. 26, Finding 6. This finding is not in dispute.

At step six, the ALJ found that given plaintiff's age (that of a "younger individual"), her education level, her past work experience, and her RFC, plaintiff could successfully transition to other work, and was therefore not disabled. Tr. 27, Findings 7-8, 10. The ALJ also found that once plaintiff turned 50, moving her into a different age group ("individual

closely approaching advanced age"), she would be disabled. Tr. 27-28, Findings 11-12. The ALJ relied on the Medical-Vocational Guidelines ("Grids") in making both determinations. Tr. 27-28. The finding that plaintiff was not disabled prior to her fiftieth birthday is in dispute.

II. Plaintiff's Allegations of Error

Plaintiff challenges the ALJ's decision on four grounds. First, plaintiff argues that the ALJ's reasons for discrediting plaintiff's testimony regarding her ailments are either unsupported by the evidence or insufficient as a matter of law. Second, plaintiff argues that the ALJ failed to state independent reasons for rejecting the lay witness testimony of her son. Third, plaintiff contends the ALJ erred in his evaluation of plaintiff's RFC. Finally, plaintiff asserts that the ALJ improperly applied the Grids to assess the availability of jobs plaintiff could perform in the economy. Because I find the ALJ improperly rejected the competent lay witness testimony of plaintiff's son and that such rejection constitutes reversible error, I do not address plaintiff's other challenges to the ALJ's decision.

An ALJ is required to consider testimony of lay witnesses and may discredit such testimony only if he "give[s] reasons that are germane to each witness." Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993). A wholesale reason for rejecting the testimony of all witnesses does not meet the "germane to each witness" standard. Smolen v. Chater, 80 F.3d 1273, 1289 (9th Cir. 1996). Alleged bias as a family member is not a valid ground for rejecting lay testimony; in fact, the Ninth Circuit

has recognized family members have special value as lay witnesses because of their opportunity to observe claimants on a daily basis. Id.

The ALJ failed to separately explain his reasons for rejecting Brandon's testimony. He appears to apply his reasons for discrediting plaintiff's testimony to Brandon's testimony without explaining which reasons are "germane" to Brandon. In fact, after a brief summary of Brandon's testimony, the only reference to Brandon is the statement that "the allegations of the claimant and her son are not entirely credible in light of the treatment record and the opinion of her treating physician." Tr. 481. The ALJ then lists his reasons for discrediting plaintiff's testimony. Tr. 481-82. The ALJ's summary of the evidence discrediting plaintiff focuses primarily on a determination that plaintiff exaggerated her symptoms in two psychological evaluations and failed to seek treatment for certain medical complaints. Id. This evidence has no apparent bearing on Brandon's credibility, and the ALJ does not indicate which, if any, of the other reasons contributed to his finding that Brandon is not credible.

The Commissioner argues that rejecting both plaintiff's and Brandon's testimony based on the same reasons is proper because "the testimony from [p]laintiff's son is inextricably connected to plaintiff's credibility, because although [p]laintiff had pain and other symptoms, the medical evidence does not support her alleged functional limitations." Def.'s Br. 12. I find this argument unpersuasive. The Ninth Circuit has clearly held that lay witness testimony as to a claimant's

symptoms or how an impairment affects ability to work is competent evidence and cannot be disregarded without comment, even when it conflicts with the medical witnesses' testimony. Nguyen v. Chater, 100 F.3d at 1462, 1467 (9th Cir. 1996). The ALJ must address any inconsistencies between lay witness testimony and medical evidence in his decision and explain why the lay witness testimony is incredible, particularly because sometimes such inconsistencies merely reflect objective medical evidence's inability to fully convey a medical condition's true impact on a claimant. See SSR 96-8p ("Careful consideration must be given to any available information about symptoms because subjective descriptions may indicate more severe limitations or restrictions than can be shown by objective medical evidence alone.")

The Commissioner next argues that even if Brandon's testimony is credited as true, it would not change the outcome, because the testimony "does not establish disability or show the severity of plaintiff's impairments and how they affected her ability to work prior to 2005." Def.'s Br. 13. I disagree. Daily crying spells lasting most of the day and the need to take a 10 to 15 minute break every 15 to 20 minutes are certainly limitations that, if true, would need to be considered in evaluating whether there are jobs plaintiff could perform. See SSR 96-8p ("RFC is an assessment of an individual's ability to do sustained work-related physical and mental activities . . . on a regular and continuing basis. A "regular and continuing basis" means 8 hours a day, for 5 days a week [.]").

Finally, the Commissioner argues that even if rejecting Brandon's testimony was error, such error is harmless, because "the lay testimony does not overwhelm the substantial evidence that supports the ALJ's finding of non-disability prior to her birth date in 2005." Def.'s Br. 13. Again, I disagree. The Ninth Circuit holds that, "where the ALJ's error lies in a failure to properly discuss competent lay testimony favorable to the claimant, a reviewing court cannot consider the error harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination." Stout v. Commissioner, 454 F.3d 1050, 1056 (9th Cir. 2006). Therefore, the test is, when crediting Brandon's testimony as true, could any reasonable ALJ conclude that plaintiff was disabled prior to her fiftieth birthday?

In Bruce v. Astrue, claimant's wife testified that at least twice each week, her husband refused to get out of bed, bathe, or eat due to his severe depression. 557 F.3d 1113, 1115 (9th Cir. 2009). A vocational expert testified, in response to the ALJ's hypothetical question, that the claimant could perform unskilled jobs available in the national economy. Id. The vocational expert noted, however, that missing two or more days of work per week would preclude claimant from working at those jobs. Id. The Ninth Circuit held that the ALJ could not discredit the wife's testimony based on the ALJ's determination that such testimony was "irrelevant" to medical conclusions. Id. at 1116. The court further held that rejecting the wife's testimony simply because it was not

supported by medical evidence in the record violated SSR 88-13, which requires the consideration of such lay testimony. Id. Brandon's testimony similarly addresses plaintiff's ability to work. Uncontrolled, day-long crying, like an inability to get out of bed or bathe, precludes work on a "regular and continuing basis." Employers do not generally consider regular crying acceptable workplace behavior, and such severely manifested depression is likely to cause work absences. In addition, employers do not allow employees to take a 15 minute break every 20 minutes. The ALJ's failure to directly consider Brandon's testimony regarding plaintiff's symptoms mirrors the error in Bruce.

Where lay testimony is found credible, limitations discussed in that testimony must be included in hypothetical questions posed to vocational experts. Bruce, 557 F.3d at 1116. None of the hypothetical questions posed to the vocational experts in the 2003 and 2006 hearings included the specific limitations testified to by Brandon. However, the VE did opine that missing two or more days of work per month precluded successful employment at any of the jobs discussed. Because chronic crying spells and the need to take frequent breaks would be considered unacceptable workplace behavior and could result in two or more absences per month, I find that a reasonable ALJ could conclude that the limitations detailed in Brandon's testimony precluded plaintiff from working.

When a decision denying disability benefits is reversed, an award of benefits may be directed "where the record has been fully developed and where further administrative proceedings

would serve no useful purpose." Smolen, 80 F.3d at 1292. That is not the case here. There are clear conflicts between Brandon's testimony regarding plaintiff's symptoms and limitations and the medical examiners' conclusions regarding plaintiff's ability to work. Further, the vocational expert was not consulted regarding Brandon's testimony when answering hypothetical questions regarding plaintiff's ability to work. Accordingly, I remand for further development of the record.

CONCLUSION

The Commissioner's decision is not based on substantial evidence in the record and is therefore reversed and remanded for further development of the record as stated above.

IT IS SO ORDERED.

Dated this 9 day of July 2009.

/s/ Ann Aiken
Ann Aiken
United States District Judge